

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA COMMISSIONER OF HEALTH

In the Matter of the Disqualification of
African Market Farmers,
WIC Vendor No. 1624

**RECOMMENDATION FOR
SUMMARY DISPOSITION**

This matter is before Administrative Law Judge Manuel J. Cervantes (“ALJ”) on the Minnesota Department of Health’s (“Department”) Motion for Summary Disposition. On March 13, 2009, the Department served a Notice of and Order for Hearing and Prehearing Conference (“Notice”) on African Market Farmers (“Respondent”) by U.S. mail. The Notice scheduled a prehearing conference for April 21, 2009.¹

Gina D. Jensen, Assistant Attorney General, appeared on behalf of the Department of Health. Bassirou Komare, pro se, appeared on behalf of the Respondent at the prehearing conference and replied to the Department’s Motion and proposed recommendation.

During the course of the prehearing conference, the parties agreed that there were no material facts in dispute and that they wished to proceed by summary disposition. The parties agreed to a briefing schedule and the ALJ issued a Scheduling Order, dated April 23, 2009.²

The Department filed its Motion with the Office of Administrative Hearings on May 14, 2009. Respondent filed its letter response to the Department’s Motion on May 28, 2009. On June 4, 2009, the Department filed and served its reply. The record closed on July 6, 2009, upon receipt of the Department’s proposed recommendation and Respondent’s reply.

STATEMENT OF ISSUE

The issue in this case is whether the Department properly disqualified Respondent for six months as a vendor in the Special Supplemental Nutrition Program for Women, Infants and Children (“WIC Program”) based on the U.S. Department of Agriculture (“USDA”) Food and Nutrition Service Supplemental Nutrition Assistance Program’s (“SNAP”)³ imposition of a hardship civil money penalty (“CMP”) upon Respondent, in lieu of a six-month disqualification from SNAP.

¹ Notice of and Order for Hearing and Prehearing Conference.

² Scheduling Order.

³ SNAP became the new name for the federal Food Stamp Program on October 1, 2008.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the ALJ makes the following:

RECOMMENDATION

1. That the Commissioner of Health ("Commissioner") GRANT the Department's Motion for Summary Disposition; and

2. That the Commissioner UPHOLDS the Department's disqualification of African Market Farmers.

Dated: July 24, 2009

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record and this report. The Commissioner may adopt, reject or modify this Report and Recommendations.

Under Minn. Stat. § 14.61, the Commissioner may not make a final decision until after the parties have had access to this report for at least 10 days. During that time, the Commissioner must give any party adversely affected by this report an opportunity to file objections to the report and to present argument supporting its position. Parties should contact Dr. Sanne Magnan, Commissioner of the Department of Health, P.O. Box 64975, St. Paul, Minnesota 55164-0975, (651) 201-5000, to learn the procedure for filing exceptions or presenting argument.

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration for doing so. The Commissioner must notify the parties of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve her final decision upon each party and the ALJ by first class mail or as otherwise provided by law.

MEMORANDUM

I. Jurisdiction

The ALJ and the Department have jurisdiction pursuant to Minn. Stat. § 14.55 and Minn. R. 4617.0100. The Respondent was given notice of the hearing in this matter and the Department has complied with all relevant procedural requirements.

II. Contention of the Parties

This is an appeal by Respondent from the Department's determination letter dated December 29, 2008, terminating Respondent's vendor agreement and disqualifying Respondent from the WIC program for a period of six months, beginning January 28, 2009.⁴ The Department based the six month disqualification on the application of Minn. R. 4617.0084, subp. 10(B) by virtue of the fact that the USDA imposed a CMP in lieu of a six-month disqualification from SNAP for violating the food stamp program.⁵ Respondent contends that it made an honest mistake and that the disqualification affects its loyal customers. Respondent offers to pay a small fine in lieu of a six month disqualification.⁶

III. Procedural Standard

Summary disposition is the administrative equivalent of summary judgment in district court practice. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law when the law is applied to those undisputed facts.⁷ The Office of Administrative Hearings has generally followed summary judgment standards developed in judicial courts when considering motions for summary disposition in contested cases matters.⁸ A genuine issue is considered one that is not frivolous or a sham, and a material fact is one whose resolution will affect the result or outcome of the case.⁹ A moving party has the initial responsibility of showing no material fact is in dispute. The ALJ is to make a recommendation about the appropriate interpretation of the law and about how that law applies to the undisputed facts.

IV. Facts

The WIC Program provides pregnant, postpartum, and breastfeeding women, as well as infants and children up to the age of five, with nutritious foods, nutrition

⁴ Notice of Disqualification (Exh. C).

⁵ The record is silent as to whether Respondent challenged the USDA's CMP sanction for violating the Food Stamp Program.

⁶ Reply of B. Konare, dated May 21, 2009.

⁷ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. 1400.5500, K; Minn. R. Civ. P. 56.03.

⁸ See Minn. R. 1400.6600 (2007).

⁹ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau, Inc. v. Minnesota Dept. of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

education and referrals for other health care services. The program is federally funded, managed by the State, and administered by approximately 75 local WIC agencies. The Minnesota WIC program serves approximately 145,000 participants each month.¹⁰

Local WIC agencies provide eligible women and children (“participants”) with WIC vouchers that they can redeem for specific types of WIC-allowed foods at approved retail stores and pharmacies, known as WIC vendors. Each voucher contains a unique identification number and lists the amounts and types of food the participant is entitled to receive with that voucher.¹¹

In order to become a WIC vendor, a store must apply to the WIC program. If the store meets program requirements, store personnel must receive training and the owner must execute a retail food vendor agreement. The retail food vendor agreement is a contract between the Department and the vendor that, among other things, describes the terms of the vendor’s participation in the program, states the vendor must comply with all applicable federal and state regulations and outlines the penalties for failure to comply with program requirements. The Department gives each WIC vendor a vendor stamp with a unique identification number. The vendor uses the stamp to imprint the number onto each voucher it accepts.¹²

Respondent operates a retail food store located at 3050 Brookdale Drive in Brooklyn Park, Minnesota. The Department and Respondent entered into retail food vendor agreements beginning in December of 2006.¹³ On October 22, 2008, the USDA Food and Nutrition Service’s SNAP sent a determination letter informing Respondent of certain violations of federal regulations governing SNAP by Respondent’s store personnel. The determination letter imposed a hardship CMP on Respondent, in lieu of a six-month disqualification from SNAP. The USDA Food and Nutrition Service did not disqualify Respondent from SNAP for the six month period set forth in SNAP regulations because it determined that disqualification of Respondent would cause hardship to SNAP households. In making its hardship determination, the USDA Food and Nutrition Service relied on information that there are no SNAP retailers within one mile of Respondent which sell comparable ethnic foods.¹⁴

On or about December 5, 2008, a Food and Nutrition Service employee forwarded a copy of Respondent’s determination letter to the Department.¹⁵ The Department was notified that the SNAP decision was final. In a letter, dated December 29, 2008, the Department notified Respondent that based on the CMP imposed by the USDA Food and Nutrition Service’s SNAP and pursuant to Minn. R. 4617.0084, subp. 10(B), the store’s WIC Vendor Agreement would be terminated

¹⁰ Affidavit of Rick Chiat, Department Supervisor, WIC Vendor Unit.

¹¹ Id.

¹² Id.

¹³ Id., Retail Food Vendor Agreement, effective April 1, 2008 (Exh. A).

¹⁴ Id., USDA Assessment of CMP, dated October 22, 2008 (Exh. B).

¹⁵ Id.

and Respondent would be disqualified from the WIC program for a period of six months, beginning January 28, 2009.¹⁶

Minn. R. 4617.0084, subp. 10(B), states:

If the [federal] food stamp or food support program assesses a vendor a civil money penalty for hardship instead of disqualifying the vendor from the food stamp or food support program, the [state] commissioner shall disqualify the vendor from the WIC program for the amount of time the vendor would have been disqualified from the food stamp or food support program absent the hardship determination, except as provided in subpart 15.

Subpart 15 of Minn. R. 4617.0084 provides that prior to disqualification, the Commissioner must determine whether disqualification of the vendor will result in inadequate participant access. Respondent is located in a Tier 1 county.¹⁷ Therefore, under Minn. R. 4617.0084, subp. 15(B)(2), disqualification of Respondent would result in inadequate participant access if:

(2) as of the date of the notice of disqualification or civil money penalty:

(a) the next closest retail food vendor is more than one mile by public road from the vendor, not including roads on which pedestrians are prohibited; and

(b) there is no bus stop or other public transportation within one-half mile by public road from the vendor, not including roads on which pedestrians are prohibited.

Respondent is located at 3050 Brookdale Drive in Brooklyn Park, Minnesota. The next closest retail vendor to Respondent is Bill's Superette #4, located at 3100 Brookdale Drive, approximately 0.1 miles away. Respondent is located off the corner of Brookdale Drive and Xerxes Avenue North. Metro Transit Routes 722 and 763 stop at bus stops located at that intersection. Metro Transit's website reflects that the bus stop is 0.2 miles by public road from Respondent.¹⁸

On January 26, 2009, Respondent sent a letter to the Department appealing the disqualification.¹⁹

¹⁶ Ex. C.

¹⁷ Minn. R. 4617.0002, subp. 40(f) (2007).

¹⁸ Id.

¹⁹ Ex. D.

V. Analysis

Minnesota rules provide that a vendor shall be disqualified by the Commissioner if the vendor is assessed a CMP by the USDA for SNAP violation(s).²⁰ The only exception to this disqualification is if the Commissioner finds the disqualification will result in inadequate participant access. Respondent argues that its disqualification from the WIC Program is affecting its loyal customers. As support, Respondent states that most of its customers are from Africa and want to use their WIC vouchers at Respondent's store; therefore, Respondent claims a hardship on its customers because it is unable to meet their needs because of its disqualification from the WIC program. Respondent also states that it is willing to pay a small fine, in lieu of the six month disqualification.

The Department's position is that it has no discretion and is required, under Minn. R. 4617.0084, subp. 10(B), to disqualify Respondent from the WIC program for six months, absent a determination that Respondent's disqualification will result in inadequate participant access.

The ALJ agrees. An analysis under subpart 15 of Minn. R. 4617.0084 appropriately led the Department to conclude that Respondent's disqualification will not result in inadequate participant access. The exception does not apply to Respondent because there is another retail food vendor within .1 of a mile of Respondent's location and a bus stop within .2 of a mile. Finally, unlike federal regulation, there is nothing in the state regulations that permits the Department to impose a CMP on Respondent, in lieu of a disqualification, even if disqualification of Respondent would result in inadequate participant access.²¹

In summary, there is no dispute that Respondent received a hardship CMP from the food stamp program within the meaning of Minn. R. 4617.0084, subp. 10(B). Second, under the exception in Minnesota rules, in order to avoid disqualification, the Commissioner must make a determination that a disqualification will result in inadequate participant access. In applying the two access criteria to Respondent, the next closest retail food vendor is less than one mile from Respondent and the closest bus stop is within one-half mile of Respondent. Since neither of the elements of Minn. R. 4617.0084, subp. 15 are met, the Department could not conclude that disqualification would result in inadequate participant access. While the ALJ is sympathetic to any potential hardship on Respondent's customers as a result of Respondent's disqualification, that hardship was created by Respondent's failure to abide by the SNAP regulations, not the required enforcement action taken by the Department.

²⁰ Minn. R. 4617.0084, subp. 10 B (2007).

²¹ Minn. R. 4617.0084, subp. 15 F (2007).

The ALJ concludes that the Department followed the express language of the rules and appropriately disqualified Respondent from the WIC program and recommends that the Commissioner grant the Department's Motion for Summary Disposition and upholds the Department's disqualification of Respondent.

M.J.C.